87-1305

No.

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a negotiated settlement agreement, approved by the National Labor Relations Board without findings of wrongdoing and expressly providing for *no* admission of guilt by the party-employer, nevertheless may serve as the basis for an original finding of "unclean hands" by a court of appeals to support the enforcement of a bargaining order in a separate proceeding?

2. Whether a court of appeals, in enforcing a bargaining order of the National Labor Relations Board, may rely solely on *post hoc* rationalizations, initially propounded by appellate counsel at oral argument, without evaluating the agency's grounds for issuance of the bargaining order?

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DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in action No. 87-3801 on October 28, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 87-3801 (4th Cir. October 28, 1987), *reh'g denied*, No. 87-3801 (December 11, 1987),

is unpublished (enforcement ordered at 833 F.2d 310 (4th Cir. 1987)). The final decision of the National Labor Relations Board is reported at 124 L.R.R.M. 1167, 282 N.L.R.B. No. 88 (December 24, 1986). The initial findings and recommendations of the administrative law judge, dated May 30, 1984, are unreported. All three decisions are printed in the separately bound Appendix to this Petition.

The settlement agreement entered by Koons Ford, District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, and the General Counsel of the National Labor Relations Board on March 25, 1987 in a separate agency proceeding; the decision of the National Labor Relations Board approving the settlement agreement; and the *pro forma* judgment of the United States Court of Appeals for the Fourth Circuit enforcing the agency decision, entered in action No. 87-3837 on August 6, 1987, are printed in the Appendix.

JURISDICTION

Koons Ford seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 28, 1987. A petition for rehearing and suggestion for rehearing in banc was denied on December 11, 1987, and this Petition is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the National Labor Relations Board's Rules and Regulations and Statement of Procedure, 29 C.F.R. § 101.1 *et seq.*, are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

On November 24, 1982, District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("Union"), filed a petition with the National Labor Relations Board ("NLRB" or "Board") seeking an election among a described unit of service department employees of Petitioner Koons Ford of Annapolis, Inc. ("Koons Ford" or "Company"). After a majority of employees voted to reject the Union as their bargaining representative, the Union filed election objections and unfair labor practice charges. On May 30, 1984, an NLRB administrative law judge issued an initial decision finding Koons Ford guilty of certain unfair labor practices. Over two and one-half years later, on December 24, 1986, the Board affirmed, as modified, the findings and recommendations of the administrative law judge, thereby directing Koons Ford to recognize the Union and, upon request, to engage in collective bargaining. On Koons Ford's petition for review of the Board's bargaining order, the United States Court of Appeals for the Fourth Circuit ordered enforcement, holding that Koons Ford could not meet a "clean hands" requirement as a condition for objecting to the bargaining order because of its execution of, and compliance with, a voluntary settlement agreement in a separate NLRB proceeding.

The May 1984 Findings And Recommendations Of The Administrative Law Judge.

On January 12, 1983, thirty-nine out of sixty-six service department employees of Koons Ford [1] voted *not* to select the Union as their bargaining representative. (A-47). Thereafter, on March 14, 1983, upon election objections filed by the Union, a Regional Director of the Board issued a complaint and notice of hearing, alleging Koons Ford had violated Sections 8(a)(1), (a)(3) and

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[1] Koons Ford is engaged in the retail sale and service of automobiles. (A-48).

(a)(5) of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 158(a)(1), (a)(3), (a)(5), by granting pay raises and by engaging in prohibited conduct against employees in the nature of threats, interrogation and surveillance. (A-47, A-49). On May 30, 1984, after a consolidated hearing on the election objections and the unfair labor practice complaint, the administrative law judge issued a decision finding (1) the Union had obtained a card majority of bargaining unit employees, and (2) the unfair labor practices were sufficient to preclude the possibility of a fair second election. Consequently, the administrative law judge recommended that the election be set aside and that Koons Ford should be ordered to recognize and bargain with the Union. (A-128). Koons Ford filed exceptions to the Board. (A-30).

The Motions To Reopen The Record.

More than three years passed between the close of the agency hearing in October 1983 and the Board's final decision in December 1986. (A-3, A-4). During this period Koons Ford filed with the Board, in accordance with its Rules and Regulations,[2] three separate motions to accept supplemental evidence of dramatically changed circumstances at the Company that would establish the current efficacy of a fair second election among employees in lieu of a bargaining order. (A-4). Specifically, the proffered evidence revealed a complete change in ownership, as well as significant managerial turnover. Moreover, at approximately the time of the Board's decision, there existed a 68.2% turnover in the original bargaining unit such that only twenty-one, or 31.8%, of the "original" sixty-six proposed bargaining unit employees were still employed with the Company. When factoring in the growth of the proposed bargaining unit to ninety-two employees, 77.2% of the employees working in proposed

[2] 29 C.F.R. § 102.48(d)(1) (1987). (A-147).

bargaining unit positions at the time of the Board's order were not employed in unit positions at the time of the election campaign, and did not receive an opportunity to vote on the union representation issue. Moreover, only 10.8% of the then-current unit of employees had actually expressed their desire for union representation through union cards.[3]

The December 1986 Decision And Order Of The NLRB.

On December 24, 1986, the Board issued a final decision and order. The Board determined, *inter alia*, that the former owner and certain managers of Koons Ford had directed threats of plant closure, layoffs and discharge against several employees during the union campaign in December 1982. (A-34-36). Thereafter, the Board found, through examination of authorization cards, that the Union had, at least by December 16, 1982, achieved majority status (A-39 n.17). Refusing to accept the proffered supplemental evidence of owner, managerial and employee turnover in Koons Ford's three motions to reopen the record (A-40 n.18), the Board, on the basis of a hearing record that closed over three years earlier, directed Koons Ford to recognize the Union and, upon request, to engage in collective bargaining. (A-42).

The March 1987 Settlement Agreement.

In March 1987, in a separate Board proceeding, Koons Ford, the Union and the General Counsel of the NLRB settled certain unfair labor practice charges filed against the Company between December 1985 and May 1986.[4] Subsequent to the completion of a lengthy and vigorously contested hearing, yet prior to the submission of briefs

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[3] *See* Third Motion to Reopen the Record for the Receipt of Supplemental Evidence, *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-15050, 5-RC-11899 (November 7, 1986).

[4] *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-17683, 5-CA-17917 and 5-CA-17933, *enf'd*, No. 87-3837 (4th Cir. 1987).

or a ruling by the administrative law judge, the parties entered into a formal Settlement Stipulation ("Agreement") pursuant to the Board's Rules and Regulations.[5] The Agreement, containing no findings of guilt, incorporates a negotiated "nonadmissions clause" such that it was expressly understood among the parties that by entering into the Agreement Koons Ford did not admit to violating the Act. (A-13).

The Agreement received the required approval of the Board and the administrative law judge,[6] who noted the Agreement would "result in the accelerated restoration of harmony between [Koons Ford] and the [Union], and [would] conserve the resources of all parties and the Board in reviewing a transcript in excess of 4100 pages and the preparation of briefs and decisions."[7] The Board's order, consistent with the nonadmissions clause in the Agreement, does not contain any findings that Koons Ford violated the Act. (A-19). Koons Ford complied fully with the terms of the Agreement upon its approval by the Board.[8]

The Decision Of The Fourth Circuit.

In enforcing the bargaining order of the NLRB,[9] the Court of Appeals failed to resolve the crucial issue presented for review that, as a legal matter, in refusing to consider properly the passage of time and changed cir-

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[5] Settlements obtained after the issuance of a complaint are governed by 29 C.F.R. § 101.9. (A-143).

[6] *See* 29 C.F.R. § 101.9. (A-143).

[7] Recommendation of Approval of Formal Settlement (April 8, 1987). (A-15-16).

[8] The Agreement, through the Board's order, was subsequently enforced in a *pro forma* proceeding by the United States Court of Appeals for the Fourth Circuit on August 6, 1987. (A-28).

[9] The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 2349 (1982).

cumstances reflecting owner, managerial and employee turnover, the Board failed to make a reasoned analysis of the propriety of a bargaining order.[10] (A-4, A-5). The Fourth Circuit recognized that "[t]he alleged changes in ownership and management involve[d] unresolved questions of fact."[11] (A-5 n.1). It further briefly discussed apposite Fourth Circuit authority wherein that court "refused to enforce a bargaining order when the Board had failed to consider substantial changes in ownership and management, as well as high employee turnover."[12] (A-4). Nevertheless, after finding the Board had not addressed the issue of the turnover in ownership and management, the Fourth Circuit

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[10] Koons Ford also appealed the Board's findings on (1) the union majority based on authorization cards, and (2) the conferral of economic benefits for unlawful purposes. The Fourth Circuit failed to address these issues.

The Center on National Labor Policy, Inc., representing a bargaining unit majority of fifty-three Koons Ford employees, filed a brief *amicus curiae* and argued orally in the Fourth Circuit in support of Koons Ford and in opposition to the bargaining order.

[11] Specifically, the Court of Appeals determined there were unresolved questions concerning, *inter alia*, (1) whether there was really a change in ownership for purposes of a bargaining order; (2) the termination prior to the election of a manager who committed unfair labor practices and the impact of that discharge on the violations; (3) the implications resulting from the fact that a senior manager may not have committed any "hallmark" violations; and (4) whether another manager guilty of certain violations may occupy too low a level to poison the atmosphere and render a fair second election unlikely. (A-5 n.1).

[12] *See NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841-42 (4th Cir. 1982) (*Apple Tree* II); *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350, 1356 n.8 (4th Cir. 1971) (*General Steel* II); *see also NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984); *Chromalloy Mining and Minerals Alaska Division, Chromalloy American Corporation v. NLRB*, 620 F.2d 1120, 1133 (5th Cir. 1980); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980).

refused to decide whether the Board was obliged to do so prior to issuing a bargaining order. (A-5).

In declining to rule on the issues presented for review, the Court of Appeals relied on appellate Board counsel's contentions concerning the settled Board proceeding—first raised at oral argument—in enforcing the NLRB bargaining order. (A-6). Specifically, the Court of Appeals failed to examine the bases propounded by the Board for the issuance of the bargaining order. Instead, the Fourth Circuit enforced the Board's bargaining order after finding that Koons Ford "obvious[ly] . . . cannot meet the 'clean hands' requirement as a condition for objecting to the bargaining order" because of its execution of, and compliance with, a voluntary settlement agreement in another NLRB proceeding. (A-6). The Court of Appeals concluded, "It would be . . . a waste of judicial time to remand this cause to the Board to consider the 'clean hands' issue." (A-6).

REASONS WHY THE WRIT SHOULD BE GRANTED

Introduction

This petition presents two extremely important questions for review. The first question presented here—the imputability of "unclean hands" against a party to a Board-approved settlement agreement with a nonadmissions clause—has not yet been addressed specifically by this Court.[13] The resolution offered by the Fourth Circuit dramatically changes well-established principles underlying settlement agreements in a manner that absolutely cannot be reconciled with this Court's and other courts of appeals' decisions.

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[13] "Nonadmissions clauses" are regularly included in NLRB settlement agreements in order to promote the expeditious settlement of labor disputes. *See Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894 n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968).

The determination of the Court below that the execution of, and compliance with, a voluntary settlement agreement is essentially equivalent to an unqualified admission of guilt is wholly inconsistent with the traditional understanding of settlements. The significance of Board-sanctioned settlement agreements as an efficient law enforcement mechanism was recognized by this Court over forty years ago in its *Wallace* [14] decision. Since then, it has been the policy of the courts and the Board to favor such settlements and, consistent with this judicial policy, no admissions of guilt are to be imputed on account of settlement. If allowed to stand, the Fourth Circuit's decision in this case will permit serious erosion of this well-recognized precept.

The second question presented here—whether the Fourth Circuit engaged in patently improper, expansive review by adopting *post hoc* rationalizations of counsel in lieu of evaluating the decisional bases articulated by the Board—virtually compels relief by this Court. Under this Court's well-recognized *Chenery* [15] decision, an appellate court is restricted to an analysis of the agency's reasons for issuing the order. Foregoing ruling on the issues presented for review, the Fourth Circuit relied merely on appellate counsel's *post hoc* oral recitation of unfair labor practice charges and complaints from a separate settled proceeding, but which charges and complaints were never considered by the Board. That method of review constitutes a direct departure from this Court's many pronouncements on the scope of judicial analysis of agency orders. Such improper review must not be permitted to stand.

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[14] *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) (recognizing the Board's working rule to respect the terms of a settlement agreement approved by it, going behind such settlement only when the adjustment effort has failed or where there has been a subsequent unfair labor practice).

[15] *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

I. The Decision Below Adversely Affects All Settlement Agreements And Creates A Powerful Disincentive To Their Formation.

It is without cavil that settlement agreements are the preferred method of resolving disputes—the " 'lifeblood' of the administrative process, especially in labor relations." [16] In fiscal year 1986 alone the Board obtained an unfair labor practice settlement rate of nearly ninety-two percent.[17] Such a basic reversal of the traditional understanding of settlements as that proposed by the Fourth Circuit, however, will necessarily have far-ranging effects, adding tremendously to the workload of administrative agencies.

A. The Decision Fundamentally Changes Existing Settlement Law.

The Fourth Circuit's unpublished ruling [18] reading into settlement agreements [19] imputed admissions of guilt is

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[16] *NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413, 423 (1987) (quoting Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies Final Report, S. Doc. No. 8, 77th Cong., 1st Sess., 35 (1941)).

From its inception the Board has encouraged compromise and settlement. "The purpose of such . . . settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. *Wallace Corporation v. NLRB*, 323 U.S. 248, 254 (1944); *see Local 282, International Brotherhood of Teamsters v. NLRB*, 339 F.2d 795, 797 (2d Cir. 1964).

[17] NLRB General Counsel's Report Summarizing Operations in Fiscal 1986, 124 L.R.R. 158, 160 (1987).

[18] The fact that the challenged Fourth Circuit order is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217, 219 (1987).

[19] Due to the frequency of settlement agreements, the Board's implementing regulations provide specific procedural guidance:

> After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the

flatly contrary to the well-established practice throughout the federal courts that proposed or accepted compromises are not admissible as evidence of an admission of the validity or invalidity of the underlying claim or amount of damage. *See West v. Smith*, 101 U.S. 263, 272-73 (1879); *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548 (1876); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1363-64 (10th Cir. 1987); Fed. R. Evid. 408.[20] "The policy rationale which excludes an offer of settlement arises from the fact that the law favors settlements of controversies and if an offer of a dollar amount by way of compromise were to be taken as an admission of liability, voluntary efforts at settlement would be chilled." *Perzinski v. Chevron Chemical Co.*, 503 F.2d 654, 658 (7th Cir. 1974); *see* Fed. R. Evid. 408 advisory committee note. Moreover, it is recognized that offers of settlement indicate merely a desire for peace, not an admission of liability. *See Sternberger v. United States*, 401 F.2d 1012, 1018 (Ct. Cl. 1968); *see also Milton S. Kronheim & Co. v. United States*, 163 F. Supp. 620, 628 (Ct. Cl. 1958) ("[I]t is often more advantageous, economical and desirable for a party to 'buy his peace' than to go through litigation even when his chances of eventually prevailing are great."); Fed. R. Evid. 408 advisory committee note.

> Board in Washington, D.C. . . . . Ordinarily, the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

29 C.F.R. § 101.9(b)(1)(1987) (A-144). It is precisely this "favored" settlement procedure that the parties followed in the proceeding referred to by the Court of Appeals. (A-6).

[20] Federal Rule of Evidence 408 provides, in relevant part: "Evidence of . . . accepting . . . a valuable consideration in compromising . . . a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."

The general rule against an inference of guilt or "unclean hands" from the existence of a compromise agreement prevails when applied to NLRB and other[21] agency settlements. In contrast to the holding below, the Sixth and Tenth Circuits recognize that a settlement agreement differs from a finding by the Board that an unfair labor practice has been committed and is not an admission of past liability.[22] *See NLRB v. Bangor Plastics,*

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[21] For example, in *Fund of Funds, Limited v. First American Fund of Funds, Inc.*, 274 F. Supp. 517 (S.D.N.Y. 1967), at the time plaintiff commenced the action to enjoin defendant from using its common law trade name, it was also the subject of proceedings before the Securities Exchange Commission, which were later settled. The court stated:

> Consequently, when this action was commenced . . . it appears that plaintiffs may have been susceptible to the charge that they had come into equity with unclean hands. The S.E.C.'s Order of Settlement, however, made no findings. Since . . . plaintiffs have settled any disagreements they had with [the] S.E.C. respecting S.E.C.'s jurisdiction over their activities in this country, the doctrine of unclean hands should not be applied. . . .

Id. at 519 n.1. Similarly, Koons Ford has settled any disagreements it had with the NLRB and the Union without any findings of liability, and under the reasoning of *Fund of Funds, Limited*, such settlement should not serve as a basis for a current finding of unclean hands.

[22] The issuance of a complaint by the Board is analogous to a Grand Jury indictment, the former being issued when it "appears" that a charge has merit, *see* 29 C.F.R. § 101.8 (1987) (A-143), and the latter being handed down upon probable cause that the accused committed a criminal act. *See In re Bonk*, 527 F.2d 120, 126 (7th Cir. 1975). As a criminal indictment may not be considered as evidence of guilt, *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979), so the mere issuance of a complaint cannot raise an inference of liability or unclean hands. *See NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775 (6th Cir. 1967) ("Thus, [subsequent to the issuance of the complaint, yet prior to an ALJ ruling on the merits,] there has been no adjudicatory finding of an unfair labor practice, nor can one be read into the settlement

Inc., 392 F.2d 772, 775 (6th Cir. 1967) ("A settlement agreement does not amount to a finding or admission that respondent has committed an unfair labor practice. . . . The Board concedes that such agreements are most often prompted by a desire to reach an amicable disposition of the matter without the need for expensive and time-consuming hearings and court review."); *W. B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) ("It is true that the settlement agreement was not an admission that the Company had been guilty of an unfair labor practice . . . .").

Indeed, and contrary to the interpretation of the Fourth Circuit, Board decisions on the evidentiary effect of settlements uniformly strive to preserve the integrity of the agreements where honored by the settling parties to encourage stipulated settlements. The Board has held often in unfair labor practice cases that a settlement agreement entered into with the same party is not evidence of underlying guilt or of that party's proclivity to violate the Act. *See Raymond Buick, Inc.*, 173 N.L.R.B. 1292, 1293, 70 L.R.R.M. 1106, 1108 (1968), *modified*, 182 N.L.R.B. 504, 74 L.R.R.M. 1137 (1970), *enf'd*, 445 F.2d 644 (2d Cir. 1971); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894 n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968); *Local 327, International Brotherhood of Teamsters*, 160 N.L.R.B. 1919, 1920, 63 L.R.R.M. 1208, 1209 (1966). Moreover, a settlement agreement is not competent evidence that an employer bears antiunion animus. *See Southwest Chevrolet Corp.*, 194 N.L.R.B. 975, 79 L.R.R.M. 1156, 1158-59, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. at 894 n.1; *Poray*,

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agreement."); *cf. NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943) (the charge is not proof of the commission of an unfair labor practice).

Inc., 143 N.L.R.B. 617, 620, 53 L.R.R.M. 1373, 1374-75 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964).

In a further effort to maintain the viability of settlement agreements, where a charged party complies with the agreement and does not engage in post-settlement unfair labor practices, as in the instant case, the NLRB, pursuant to established policy, will not predicate other findings of unlawful conduct on presettlement activity.[23] *See Wallace Corp.*, 323 U.S. at 253-54; *U.S. Contractors, Inc. v. NLRB*, 697 F.2d 692, 695-97 (5th Cir. 1983); *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 475 (5th Cir. 1982).

In sum, the Fourth Circuit's radical interpretation of the Agreement, imputing guilt or "unclean hands" to Koons Ford, is completely at odds with authority from this Court, other circuit courts,[24] and the Board itself. Moreover, as will be shown, the lower court's interpretation creates a major disincentive to the formation of settlement agreements.

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[23] Moreover, it is well-recognized in this Court that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). The unsuitability of such agency enforcement decisions for judicial review stems in large part from the complex series of factors, discussed *infra* at 16, balanced in arriving at a decision on settlement. *See Heckler*, 470 U.S. at 831.

[24] *See, e.g., Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987) (offers to settle Age Discrimination Employment Act charges inadmissible to prove liability); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 459-60 (2d Cir. 1974) (claim for attorneys' fees under Section 4 of the Clayton Act must fail where action settled and awarding of fees "would be tantamount to a judicial assumption that settlement negotiations were predicated on defendants' admission of guilt. Such an assumption is contrary to the basic principles which underlie settlements.")

B. The Ruling Of The Fourth Circuit Seriously Undercuts The Incentive To Enter And To Honor Settlement Agreements.

In inferring *post hoc* an unqualified admission of guilt from the settlement, the Fourth Circuit has defeated the Agreement's purpose to end the labor dispute and to extinguish all the elements giving rise to it.[25] Where the settlement of a disputed or dubious claim is construed to constitute an admission of guilt on the part of the charged party, notwithstanding the arms-length negotiation of a nonadmissions clause, such party can never safely settle any doubtful complaint and, in order to be secure, will be forced to litigate all complaints fully, markedly reducing the frequency of settlements. Moreover, the Fourth Circuit's ruling creates an atmosphere wherein a charged party would have an incentive not to honor its part of the bargain, recognizing that, regardless of its commitment, the agreement may inevitably be deemed an admission of guilt in some future proceeding. *See Food and Commercial Workers Union*, 108 S. Ct. at 425.

The implications of the Fourth Circuit's decision for the Board and its enforcement of the Act are most serious. "The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of meritorious unfair labor practice cases." NLRB General Counsel's Report, 124 L.R.R. at 160.[26] In 1985 the Board obtained 8,988 agreements representing a 94.4% settlement rate. For 1986 the figures are equally substantial: 9,312 settlements of unfair labor practice cases representing a rate

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[25] *Wallace Corp.*, 323 U.S. at 253-54.

[26] *See also W. B. Johnston Grain Company*, 365 F.2d at 586 (a large majority of the Board's cases is disposed of by settlement agreements; without them, "the administration of the Act by the Board would be greatly impaired, due to the overwhelming load of cases").

of 91.7%. *Id.* The threat created by the Fourth Circuit's decision to the "lifeblood" of the administrative process is very real and certainly inconsistent with this Court's pronouncements favoring settlements.

The approach of the Fourth Circuit also inflicts real injustice on settlement participants, as well illustrated by Koons Ford's experience before the Board and the Fourth Circuit. Following a lengthy hearing on the merits in the settled case, Koons Ford, General Counsel for the Board and the Union entered into settlement negotiations prior to briefing and a ruling from the administrative law judge. (A-6, A-16). For its part, Koons Ford, consistently asserting its innnocence [27], entered into a settlement with the Board merely to establish peace in its facility and to avoid further costly and protracted litigation—not unlike many settlement participants.[28] (A-16). The General Counsel, on the other hand, engaged in a complicated balancing of factors considering the agency's resource allocation, the strength of the evidence adduced at the hearing, the seriousness of the offense, the likelihood of its repetition, and the willingness of the charged party to settle.[29] The Agreement received the approval of the presiding administrative law judge and the Board. (A-15, A-19).

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[27] Paragraph 9 of the Agreement provides: "It is expressly understood that by entering this Stipulation, [Koons Ford] does not admit it violated the National Labor Relations Act, as amended." (A-13). *See also* Recommendation of Approval of Formal Settlement, *Koons Ford of Annapolis, Inc.*, 5-CA-17863, 5-CA-17917, 5-CA-17933 (April 8, 1987) (A-16).

[28] *See Sternberger*, 401 F.2d at 1018; *Milton S. Kronheim Co.*, 163 F. Supp. at 628.

[29] *See Heckler*, 470 U.S. at 831-32; *see also* Petition of the NLRB for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 16-17, *NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413 (1987) (relating factors considered by the Board in settling a complaint).

Despite the extensive agency deliberations in the settled case, the Fourth Circuit has now held that it may ignore the reasoned decision of the NLRB to settle, violate agency practice regarding honored settlements, and pierce the Agreement containing a negotiated nonadmissions clause to find Koons Ford essentially guilty of the underlying charges where the administrative law judge and the Board did not. It is hard to imagine a more unjust or unexpected application of the Agreement than for the Court of Appeals to strip the parties of control of their negotiated settlement and use it as evidence of guilt in the bargaining order case against an unsuspecting settlement participant such as Koons Ford.[30] Moreover, the General Counsel's ability to secure settlement depends substantially on her ability to assure the charged party that the matter will not be revisited by the Board or courts (absent a breach of the stipulation). Unless this Court intervenes, every settlement defendant runs the risk that someday its agreement will be raised in some unforeseen action as evidence of prior guilt and current "unclean hands."

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[30] At the urging of the administrative law judge shortly after issuance of the Board's final bargaining order on December 24, 1986, the parties considered the utility of settling the separate agency proceeding with the recognition that the Board's final bargaining order, if enforced, would fix the relationship between Koons Ford and the Union. *See* Motion of Respondent, Koons Ford of Annapolis, Inc., To Extend Time For Filing Post-Hearing Briefs, *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-17683, 5-CA-17770, 5-CA-17917 and 5-CA-17933 (filed January 6, 1987) (A-137-140). Thus, the Fourth Circuit's reliance on Koons Ford's execution of the Agreement as the basis for enforcing the bargaining order is an egregious example of the "tail wagging the dog." It is to protect against such unforseeable anomalous results that federal courts and the Board traditionally have respected settlement agreements and refused to infer guilt therefrom in other proceedings.

II. The Board's Proper Refusal To Consider The Settled Charges And Complaints Precludes Their *Post Hoc* Resurrection By The Court Of Appeals.

This Court previously observed in its *Chenery* ruling that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." [31] It is inexplicable, therefore, that the Court of Appeals would so blatantly exceed the scope of judicial review, invade the province of the Board, and rule on the implications of a settlement agreement from a separate proceeding.

A. The Fourth Circuit's Reliance On *Post Hoc* Rationalizations Is Completely Contrary To This Court's Pronouncements On The Scope Of Judicial Review.

The ruling of the Fourth Circuit, that a settlement agreement obtained in a separate proceeding may serve as *post hoc* support to enforce the Board's bargaining order, constitutes a direct departure from established law that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Chenery Corp.*, 318 U.S. at 87. More specifically, *post hoc* rationalizations first offered by the Board's appellate counsel are an improper basis for a court of appeals to uphold an agency's action. *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974), *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974). Essentially, the assertions of appellate counsel do not constitute the "whole record" compiled by the agency, the basis for review required by § 706 of the Administrative Procedure Act. *See Overton Park*, 401 U.S. at 419; (A-142). As such, a court of appeals

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[31] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

may not "supply an alternative unstated ground to support an agency's decision if that ground is one that 'the agency alone is authorized to make.'" [32] *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 764 (1973) (quoting *Chenery*).

The Fourth Circuit, in enforcing the Board's order, abrogated all of this Court's restrictions on the scope of judicial review. In the face of *Chenery*, the Court of Appeals adopted appellate counsel's rationalizations first raised "[d]uring argument in [the] [c]ourt" (A-6), and never mentioned by the Board in its decision. Such casual disregard for the scope of judicial review must not be allowed to stand if agency decisionmaking is to have any significance.

Compounding the *Chenery* error is the Fourth Circuit's incorrect analysis of the settlement record. As a basis for its finding of unclean hands, the Court of Appeals incorrectly found that "unfair labor practice charges had been filed against Koons Ford *after* the Board issued its order in this proceeding." (A-6) (emphasis added). The record of the settled case, however, reveals that the charges and complaints that were the subject of the Agreement were issued originally between December 1985 and May 1986—well *before* the Board's bargaining order of December 24, 1986. (A-7, A-8). No new charges were issued against Koons Ford subsequent to the Board's bargaining order in this proceeding.[33]

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[32] Indeed, assuming *arguendo* some inference may be derived from the fact of settlement, it is for the Board and not the appellate court to determine what that inference is. *See South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-06 (1976) (determination of bargaining unit question by court of appeals upon review of NLRB decision held improper where Board had not passed on the question).

[33] Review of the record reveals merely a two-step technical process of settlement: first, "for the purpose of enabling the parties . . .

This material factual error is significant insofar as the Fourth Circuit based its findings of "unclean hands" on these "new" charges. (A-6). Presumably, under the lower court's reasoning, if these charges and complaints had been before the Board when it issued its bargaining order decision in December 1986, inevitably the Board would have found that no fair second election was possible in light of the "new" charges. As such, in the view of the Fourth Circuit, a remand to give the Board an opportunity to cure the deficiencies in its analysis raised by Koons Ford concerning changed circumstances would have been "a waste of judicial time." (A-6). In fact, the charges and complaints were issued, and the hearing completed, well *before* the Board's decision. The Board, however, correctly did not refer to, or otherwise rely on, those proceedings in issuing its bargaining order.[34] The Fourth Circuit's material factual error, therefore, undercuts completely both the finding of "unclean hands" and the consequent determination that remand would be a waste of judicial resources.

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to settle [the] cases," it was necessary to sever the charges for settlement in the previously consolidated case; second, amended complaints incorporating the same charges were issued. *See* Order, *Koons Ford of Annapolis, Inc.*, No. 5-CA-17683 (Mar. 2, 1987) (A-134-135).

[34] In fact, the Board neither briefed nor argued to the Fourth Circuit that the mere referral to the existence of, and compliance with, the Agreement is a proper basis upon which to deny the petition for review and grant enforcement of the bargaining order.

CONCLUSION

For the reasons stated herein, Koons Ford of Annapolis, Inc. respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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